IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5732 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VASANT M DESAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5732 of 1989

MR ARUN H MEHTA for Petitioner No. 1

MR KP RAVAL AGP for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 19/07/2004

ORAL JUDGEMENT

1.0 The petitioner by way of this petition has challenged the order dated 01/08/1989 at Annexure 'A' to

the petition passed by respondent State Government, whereby the petitioner was Prematurely retired from his service as Deputy Superintendent of Police with immediate effect in the public interest. In lieu of three months Notice, he was paid pay and allowance as per the orders contained in Govt. Resolution G.A.D.No.CRA-1087-805-G2, dated 28/07/87.

2.0 The facts of the case are that the petitioner was recruited as a Police Sub-Inspector in July 1958 and was promoted to the post of Police Inspector in August 1970. He was due to retire from service on 10/09/91 on his attaining the age of superannuation. It is the case of the petitioner that he was superseded in the promotional post of Dy.S.P., and therefore, had made representation dated 17th February 1983 against his supersession. But, he received no reply to the aforesaid representation.

2.1 The petitioner was promoted to the post of Dy.S.P. vide order dated 28/01/85 and discharged his duties as such, at various places, as per Government orders. While the petitioner was discharging his duties at C.I.D. (I.B.), Ahmedabad, he received Order dated 01/08/89, whereby he was 'prematurely retired' from his service. The said order is placed at Annexure 'A' to the petition. It is this order of the respondent Government which is under challenge before this Court in this petition.

3.0 Mr.Arun H Mehta learned advocate for the petitioner has submitted that the order dated 01/08/89 at Annexure 'A' to the petition, is contrary to the Government Resolution dated 28/07/87. In Clause (ii) of the "Procedure to be followed for premature retirement of Government Officers attaining the age of fifty years", it has been specifically stated that in case of Class I Officer, when it is finally decided not to retain him in service beyond the age of 50 years, he should be informed in the first instance by a confidential letter that Government proposes to retire him prematurely with effect from a particular date and that he can himself tender, if he so desires, a notice to Government asking for voluntary retirement. A notice for premature retirement be issued to such Government Officers ONLY after the opportunity is given to him to opt for voluntary retirement. In the present case, no notice was given to the petitioner, and therefore, the order of Premature retirement is illegal and is required to be quashed and set aside.

3.1 Mr.Mehta for the petitioner has submitted that as

per the Government Resolution dated 22/03/1984, the Government has fixed 'criteria to be followed' for compulsory retirement, which reads as under;

"III. Criteria to be followed :

(1) While reviewing the cases of officers attaining the age of FIFTY years, the following points should be taken into consideration :

(i) Whether any disciplinary proceedings are pending or contemplated against the officer ? In case of a Government servant whose integrity is in doubt, it would be appropriate to consider him for premature retirement irrespective of the assessment of his ability or efficiency in work. In other words, even if an officer's performance is good, he is efficient and physically and mentally fit, he can be prematurely retired, if Competent Authority comes to conclusion that his integrity is doubtful.

(ii) Whether the officer is physically as well as mentally fit for retention in service.

(iii) Whether the WHOLE service record of the officer is atleast SATISFACTORY ? If an officer is physically and mentally fit, and has earned SATISFACTORY confidential reports i.e. not below the average standard, he should not be prematurely retired.

(2) The following criteria should be followed to review the case of an officer attaining the age of FIFTY FIVE years;

(i) Same as item (i) and (ii) of para III above.

(ii) A record of service i.e. C.R.S. for the last eight to ten years should be good.

(iii) The physical and mental condition of officer could be known from the C.Rs. of concerned Officer. The Competent Authority may call for a special report on this point from the officer under whom he was working at that time. It is not necessary to refer the concerned officer for medical examination for this purpose.

However, where the officer may be known or

reported to be suffering from any serious disability, infirmity or diseases which makes it desirable to have a medical opinion, the Competent Authority may use its discretion to refer such officer for medical examination."

3.2 Mr.Mehta has submitted that in the order of 'Premature retirement' there was no reference to the word 'dead wood'. It was passed in public interest without considering the Confidential Reports of the petitioner at Annexure 'C' collectively. In the Confidential Reports, the superior Officer of the petitioner has only stated that the petitioner was required to improve upon his performance. Thus, there were no 'adverse' remarks in the C.R. of the petitioner as claimed by the respondent Government.

3.3 Mr.Mehta has submitted that the Ministry of Home Affairs, New Delhi, had by letter dated 01/03/89 appreciated the work of the petitioner in the issuance of Identity Cards in certain border areas of Gujarat. Apart from the above, the Office of the Spl.Inspector General of Police, C.I.D. (Intelligence), Gujarat State, had appreciated the services of the petitioner by letter dated 27/06/89, wherein it was stated that the petitioner had taken considerable pain and had worked till late night on 18/06/89 and thereby had done a good job. Thus, his efforts were appreciated by his superior Officers. He has, therefore, submitted that in spite of the above appreciative works of the petitioner, the respondent State Government passed the impugned order after 34 days from the letter dated 27/06/89, on the basis of alleged adverse remarks.

3.4 Mr.Mehta has submitted that there were two remarks in the Confidential Report of the petitioner for the year 1985 - 1986 and that both were of the same date. In the first report, by letter dated 06/01/88, the concerned Officer had incorporated 'Fair' remarks and by a letter of the same date, but with a different outward number, the same Officer had incorporated 'Adverse' remarks in the Confidential Report of the petitioner. Mr.Mehta has, therefore, submitted that it clearly establishes the non-application of mind on the part of the respondent Government.

3.5 Mr.Mehta has further submitted that by letter dated 22/05/88, the petitioner was communicated that 'Average' remarks were incorporated in his C.R. for the year 1986 - 87. It was clarified in the said letter that the remarks were not communicated as 'Adverse' remarks,

but, they were conveyed with a view to give the petitioner an opportunity to improve his performance. It was made clear therein that no representation will be entertained against the said 'Average' remarks, since they were not 'Adverse' remarks. Similar remarks were also made for the year 1987 - 88, except in Column 7 & 8 of the said order dated 02/12/88, 'Adverse' remarks were incorporated against the petitioner. For the year 1988 89, the remark was 'Fair'. Apart from that, the respondent Government had not followed the Criteria laid down in the Government Resolution dated 28/07/87 and more specifically in para 1(iii) under the "Criteria to be followed".

4.0 Mr.Mehta for the petitioner has relied upon a decision of the Apex Court in the case of Brij Mohan Singh Chopra v. State of Punjab reported in A.I.R. 1987 SC 948, wherein it has been held that while considering the question of premature retirement, it may be desirable to make an overall assessment of the Government servant's record, but while doing that, more value should be attached to the confidential reports pertaining to the years immediately preceding such considerations. Old and stale entries should not be taken into account while considering the question of premature retirement; instead the entries of recent past of five to ten years should be considered in forming the requisite opinion to retire a Government employee in public interest. It was held therein that it would be unreasonable and unjust to consider adverse entries of recent past.

4.1 Mr.Mehta has also relied upon a decision of the Apex Court in the case of State of Gujarat v. Umedbhai M. Patel reported in A.I.R. 2001 SC 1109. In the above referred case, the respondent had successfully crossed the efficiency bar at the age of 50 as well as 55 and had only less than two years to retire from service before the impugned order of compulsory retirement was passed against him. It was held therein that the impugned order of compulsory retirement was passed for extraneous reasons, as the authorities did not wait for the conclusion of the enquiry and decided to dispense with the services of the respondent merely on the basis of the allegations which had not been proved.

4.2 Mr.Mehta has also relied upon a decision of this Court (Coram : K.G.Shah, J.) delivered in S.C.A.No.4170/1989 dated 16/08/91. The following decisions in the said judgment were relied upon by the learned advocate for the petitioner;

4.2.1 In Samsher Singh v. State of Punjab & anr. and Ishwar Chand v. State of Punjab, A.I.R. 1974 SC 2192. Para 63 of the said decision is relevant which reads as under;

"No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated, it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution."

4.2.2 In Union of India v. J.N.Sinha & anr. reported in A.I.R. 1971 SC 40 it has been held the order of compulsory retirement involves no civil consequences and is not intended for taking any penal action against the Government servant, and therefore, it could not ordinarily be challenged. However, it can be challenged on the ground that the requisite opinion for prematurely retiring the Government servant was not formed or that the order was passed arbitrarily or on collateral grounds.

4.2.3 In the case of Anoop Jaiswal v. Government of India & anr. reported in A.I.R. 1984 SC 636, Their Lordships of the Supreme Court referred to the decision in the case of Parshotam Lal Dhingra v. Union of India, A.I.R. 1958 SC 36, wherein interalia it has been laid down that "government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirement of Article 31 must be complied with.

4.2.4 In the case of Ram Ekbal v. State of Bihar & anr. reported in A.I.R. 1990 SC 1368 the appellant of that case was compulsorily retired by the State by its Notification dated 26/10/88. Before 26/10/88, on 06/10/88 a Memorandum of charges was issued by the State to the appellant of that case. It was the contention of the appellant that the order of compulsory retiring him from service was made as a measure of punishment and the same being violative of the requirement of Article 311 of the Constitution was liable to be struck down. While accepting the case of Ram Ekbal Sharma, Their Lordships of the S.C. in Para-28 of the report observed as

follows;

"On a consideration of the above decisions the legal position that now emerges is that even though the order of compulsory retirement is couched in innocuous language without making any imputations against the Government servant who is directed to be compulsorily retired from service, the Court, if challenged, in appropriate cases can lift the veil to find out whether the order is based on any misconduct of the Government servant concerned or the order has been made bonafide and not with any oblique or extraneous purposes. Mere form of the order in such cases cannot deter the Court from delving into the basis of the order if the order in question is challenged by the concerned Government servant as has been held by this Court in Anoop Jaiswal's case. This being the position the respondent State cannot defend the order of compulsory retirement of the appellant in the instant case on the mere plea that the order has been made in accordance with the provisions of R.74(b)(ii) of the Bihar Service Code which prima facie does not make any imputation or does not case any stigma on the service carrier of the appellant."

4.2.5 In Om Prakash Goel v. The Himachal Pradesh Tourism Development Corporation Ltd., Shimla and anr. reported in A.I.R. 1991 SC 1490, the facts were that on 21/08/81 a regular charge sheet was served on the petitioner of that case. In that charge sheet the list of documents was appended. The petitioner replied to the charges, and thereafter, without making any reference to any of the charges of the reply of the petitioner, the order of termination of the petitioner's service was passed on 08/01/82. On those facts, Their Lordships of the S.C. quashed the order of termination of the services of the petitioner of that case holding that the termination was by way of punishment and was violative of Article 311 of the Constitution.

4.2.6 In S.C.A.No.28/1990, the Division Bench of this Court after referring to some of the judgments referred to above observed as follows;

"It is well settled principle of law that an order of compulsory retirement does not amount to dismissal or removal within the meaning of Article 311 of the Constitution of India and the said provisions, are not attracted in such cases. It is, however, always open to an aggrieved party, to contend that the requisite opinion has not been formed bonafide or that the decision is based on collateral ground or arbitrary. Under the guise

of "public interest" if unlimited discretion is regarded acceptable for making order of compulsory retirement, it will be the surest menace to public interest and must fall for unreasonableness, arbitrariness and disguised dismissal. The exercise of power must be bonafide and should promote public interest."

4.3 In D.G.Desouza v. Director General of Police, Ahmedabad & Anr. reported in 1991 (1) G.L.H. (U.J.) 10 it has been held that when the overall performance of an Officer is as "average officer" it cannot be said that the Officer has lost his effectiveness and ability, but, looking to the overall performance of the petitioner, he cannot be termed as dead-wood or worth-less, so as to require compulsory retirement.

4.4 In Jugal Chandra Saikia v. State of Assam & Anr. reported in A.I.R. 2003 SC 1362 the Hon'ble the Apex Court while upholding the order of compulsory retirement of the Division Bench of the High Court relied upon a decision in the case of Baikunth Nath Das v. Chief Distt. Medical Officer reported in AIR 1992 SC 1020 and more particularly on the principles indicated in para 34 of the said judgment which reads:

"34. Following principles emerge from the above discussion :

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehavior.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary - in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before decision in the matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records / character rolls, both favourable and adverse. If a Government is promoted to a higher post notwithstanding the adverse remarks, such remarks lost their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it communicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

4.5 In (Dr.) H.V. Shah v. State of Gujarat & Anr. reported in 1998 (1) G.L.H. 357 it was held that the object of compulsory retirement was to weed out the dead-wood and people of doubtful integrity, in order to maintain efficiency and purity in the Administration.

4.6 In P.S. Parmar v. State of Gujarat & Anr. reported in 1983 (1) G.L.R. 707. In that case the petitioner being a Government servant was ordered to be permanently retired at the age of 57. The order of premature retirement was quashed and set aside on the ground that Government's own policy was there that there should be no further review after the age of 55. The order of premature retirement was therefore held to be illegal and void.

5.0 Mr.K P Raval learned AGP has submitted that weightage was given to the service record of the petitioner for the last few years and adverse remarks which were communicated to the petitioner, prior to his promotion to the post of Dy.S.P., were not considered by the Review Committee. He has further submitted that the petitioner did not have a good service record after his promotion to the post of Dy.S.P., and therefore, the Committee thought it fit to compulsorily retire the petitioner from service.

5.1 Mr.Raval has further submitted that adverse remarks for the year 1985 - 86 were duly communicated to the petitioner with an intention to inform him about his shortcomings, but, no representation was made by the petitioner against the said adverse remarks. He has, therefore, submitted that it impliedly meant that the petitioner had accepted the said shortcomings by not making any representation against the same. He, therefore, calls for no interference by this Court.

6.0 I have heard the learned advocates for the parties and have perused the records. In view of the law laid down by the Apex Court, I am of the opinion that the order passed by the respondent authority is not in consonance with the Government Resolution. Moreover, no Notice was given to the petitioner as per the Government Resolution dated 28/07/87 i.e. pertaining to Class I Officers. The order was passed by the respondent Government in public interest and in the affidavit-in-reply filed by the respondent Government, it has not been shown as to how the duties of the petitioner affected public interest. The reasons which are shown are with respect to the petitioner being a 'dead wood'. Therefore, the affidavit-in-reply pertains to totally different reasons, than the reasons given in the Government Order dated 01/08/89.

6.1 Moreover, on the ground of 'dead wood', as mentioned in the affidavit-in-reply, the petitioner could not have been Prematurely retired, in view of the letter dated 17/06/89 of the Spl.Inspector General of Police, C.I.D. (Intelligence), Gujarat State and letter dated 01/03/89 of the Ministry of Home Affairs, New Delhi, whereby both the superior Officers had appreciated the petitioner's work. The respondent Government ought to have considered these letters which were issued in appreciation of the petitioner's duties. Therefore, the order of Premature retirement has been passed contrary to the records and is required to be quashed and set aside.

7.0 For the foregoing reasons, this petition is allowed. The order of Premature retirement of the petitioner dated 01/08/89 passed by the respondent Government at Annexure 'A' to the petition, is quashed and set aside. The petitioner is ordered to be treated on service, as if the impugned order of Premature retirement had not been passed.

7.1 The petitioner has already retired from service on his attaining the age of superannuation. Therefore,

he is entitled for salary for the period from 01/11/89 till the date of superannuation. All the monetary and retiral benefits are ordered to be paid to the petitioner within a period of six months from the date of receipt of this order. If the same is not paid within the stipulated period, then the petitioner will be entitled for interest @ 9% per annum and the same shall be recovered from the account of the erring officer. Rule is made absolute to the aforesaid extent with no orders as to costs.

(K. S. Jhaveri, J.)

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